No. 96-1296

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,
Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF TO BRIEF IN OPPOSITION 1

ARGUMENT 1

I. THERE IS NOW AN ACTUAL SPLIT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COMMON LAW OR STATE LAW APPLIES TO THE ISSUE OF ASSIGNABILITY OF THE RTC'S RIGHTS UNDER FIRREA 1

II. FEDERAL LAW GOVERNS THE NATURE OF THE RIGHTS CONFERRED BY FIRREA UPON THE RTC AS RECEIVER FOR FAILED FINANCIAL INSTITUTIONS 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Page

FDIC v. Bledsoe,
989 F.2d 805 (5th Cir. 1993.....1

Federal Financial Co. v. Hall,
No. 96-1143, (4th Cir. March 4, 1997).....1, 2, 3

O'Melveny & Myers v. FDIC,
___ U.S. ___, 114 S. Ct. 2048, 2054 (1994.....1

RTC Commercial Loan Trust v. Winthrop Mgt.,
923 F. Supp. 83 (E.D. Va. 1996) 3

WAMCO III, Ltd. v. First Piedmont Mortgage Corporation,
856 F. Supp. 1076 (E.D. Va. 1994)).....2, 3

REPLY BRIEF TO BRIEF IN OPPOSITION

Thomas E. Horton respectfully submits this brief in reply to Union Recovery Limited Partnership's brief in opposition to the petition for a Writ of Certiorari.

ARGUMENT

I. THERE IS NOW AN ACTUAL SPLIT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COMMON LAW OR STATE LAW APPLIES TO THE ISSUE OF ASSIGNABILITY OF THE RTC'S RIGHTS UNDER FIRREA.

On March 4, 1997, the United States Court of Appeals for the Fourth Circuit issued its opinion in Federal Financial Co. v. Hall, No. 96-1143 (4th Cir. March 4, 1997). Relying on the decision of the United States Supreme Court in O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S.Ct. 2048 (1994), the Fourth Circuit flatly rejected the flawed analysis of FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993), and its progeny. Federal Financial, slip op. at 4-7.

In Federal Financial, the Fourth Circuit did what the Virginia Supreme Court failed to do in the case below, which is to examine and to expose the suspect rationale of the Bledsoe cases, upon which the Virginia Supreme Court relied and Respondent continues to rely. Resp. Brief at 17-18. In substance, though not in result, the Fourth Circuit endorsed the analysis presented by Horton in this petition. With the Fourth Circuit opinion in Federal Financial, there is now a split in authority between the Fifth Circuit and the Fourth Circuit over whether federal common law or state law governs the question presented on this petition.

II. FEDERAL LAW GOVERNS THE NATURE OF THE RIGHTS CONFERRED BY FIRREA UPON THE RTC AS RECEIVER FOR FAILED FINANCIAL INSTITUTIONS.

The Fourth Circuit in Federal Financial failed to determine whether, as a matter of federal law, the FIRREA statute of limitations confers upon the RTC a right which is "personal" to the RTC in its capacity as receiver for a failed financial institution. Because of this oversight, the Fourth Circuit incorrectly relied upon the decision of the Virginia Supreme Court in the case below in reaching its conclusion that the FIRREA statute of limitations is assignable. However, the Virginia Supreme Court did not discuss in its opinion the federal law issue of whether the FIRREA statute of limitations is a right "personal" to the RTC. The Virginia Supreme Court merely refused, without explanation, to adopt the conclusion of WAMCO that the federal law right is "personal" to the RTC in its capacity as receiver, apparently finding comfort in the fact that the Bledsoe cases had made no express determination that the federal law right was "personal" to the RTC.

Because the Virginia Supreme Court did not address the issue of whether the FIRREA statute of limitations is a right "personal" to the RTC, the Virginia Supreme Court may very well have found it implicit in the holdings of the Bledsoe cases that, because the right was determined to be assignable, the courts must necessarily have determined that, as a matter of federal law, the right conferred upon the RTC was not "personal." This is at least a plausible explanation why the Virginia Supreme Court rejected WAMCO without explanation and, then, cited Bledsoe as the principal case upon which it relied. If, in fact, the Virginia Supreme Court relied upon an implicit finding in the Bledsoe cases that, as a matter of federal law, the right is not "personal" to the RTC, then the Fourth Circuit opinion raises serious concern

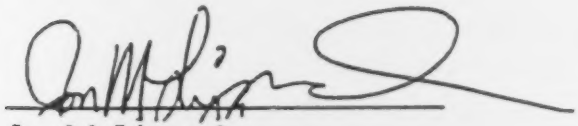
regarding the Virginia Supreme Court's reliance on Bledsoe. If, on the other hand, the Virginia Supreme Court ruled as a matter of state law that the right is not "personal" to the RTC, then the Virginia Supreme Court improperly applied state law to define the scope of a federal law right expressly conferred upon the RTC by Congress and the Fourth Circuit is wrong to follow the Virginia Supreme Court ruling. Either way, review by the United States Supreme Court is warranted.

Federal law, not state law, determines the nature of a right conferred upon an entity, here the RTC, by federal legislation. To date, no federal court other than WAMCO III, Ltd. v. First Piedmont Mortgage Corporation, 856 F. Supp. 1076 (E.D. Va. 1994) (FIRREA statute of limitations is personal right of RTC arising solely by virtue of its status as receiver), and RTC Commercial Loan Trust v. Winthrop Mgt., 923 F. Supp. 83 (E.D. Va. 1996) (right to enforce contract in federal court is a personal right of RTC as receiver), have ruled precisely on this issue of federal law. The Fourth Circuit acknowledged that "[u]nder the WAMCO analysis, the RTC's right to the six-year statute of limitations is 'personal to the assignor' and, therefore, under general common law principles, not assignable." Federal Financial, slip op. at 4-5. The Fourth Circuit did not take issue with the finding of the WAMCO court that the FIRREA statute of limitation is a right which is "personal" to the RTC. Nor did the Fourth Circuit discuss why an analysis of the nature of the statutory right, as a matter of federal law, is not necessary.

CONCLUSION

For the reasons set forth above and as stated in the petition, this Court should grant the petition for a Writ of Certiorari.

Date: March 12, 1997



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